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Consumer Welfare in EU Competition Law: What Is It (Not) About?

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More than a decade after the proclamation of consumer welfare as a goal of EU competition law, a fundamental question remains unanswered: namely, what is the content of the EU consumer welfare standard? What types of benefits and harms count respectively as welfare and as harm? Whose harm and whose benefit is included in the definition? Few answers have been available to these crucial, from a legal perspective, questions. The goal of this article is to explore the meaning of consumer welfare in terms of these questions. In particular, considering the assumption that the notion of consumer welfare in EU competition law is borrowed from economics, the article will attempt to verify to what extent consumer welfare coincides with the notion of consumer surplus in economics. The focus is therefore on 1) whether consumer can be taken to mean the final consumer or the intermediary purchaser and 2) whether the notion of harm refers primarily to price effects. Part I of the paper focuses on the definition of consumer welfare in antitrust law and in economics. Part II considers the definitions of consumer welfare in the Commission's soft law and argues that a finding of an end user surplus cannot be supported. Part III turns to the jurisprudence of the European Courts and argues that support for end-user surplus cannot be found in the Court's case law. The paper concludes that although we do not find support for an end-user surplus standard in the Court's jurisprudence, the change in language in the 2012 *Post Danmark* ruling leaves us wondering as to whether and in what direction the Court's approach might change.

INTRODUCTION

It is perhaps shocking to think that the meaning of “consumer welfare” – purportedly the ultimate goal of EU competition policy at least for the past 10 years – remains unclear. It is furthermore ironic given that one of the reasons consumer welfare was introduced was to bring clarity and uniformity in light of the upcoming decentralization of enforcement and big enlargement in 2004.¹ A standard based on economic science, the reasoning goes, would be objective and specific enough to keep competition law enforcement consistent throughout the EU, thus minimizing divergence and guarding against protectionism. Unfortunately, more than fifteen years after its introduction in

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¹ David Gerber, 'Two Forms of Modernization in European Competition Law' (2008) 31(5) *Fordham International Law Journal* 1235, 1253-1254.

the vocabulary of DG Competition,² consumer welfare remains a vague term which generates more questions than it answers.

What consumer welfare means is far from self-evident. Who qualifies as a consumer? What counts as welfare? As the references for preliminary ruling in *Syfait*,³ *Sot Lelos Kai*⁴ and *T-Mobile*⁵ showed, national courts and national authorities⁶ struggle with such questions. This is understandable given the fact that consumer welfare is not properly defined in any binding legal instrument.⁷

There are other good reasons why the concept is unclear and these have to do with the origins of the concept and the history of its use in antitrust literature. Firstly, consumer welfare is a term borrowed from economics. According to anecdotal evidence, many economists, but also some lawyers, believe that the term “consumer welfare” as used by the European Commission or by competition lawyers has the same meaning as the term “consumer welfare” used in economics textbooks. The second reason for confusion is very much connected to the first. Consumer welfare was first introduced in US antitrust law and was subsequently adopted in other jurisdictions, thus strengthening the perception that consumer welfare is a solid concept the meaning of which is anchored in economics. However, as this article aims to show, looking to the US experience with consumer welfare for clarity as to how the term is to be interpreted *in law*, is not much of use either.

In the EU, there are more specific reasons for confusion. Firstly, if one is to look to the definitions of consumer welfare offered by the Commission in its soft law instruments, speeches and papers, these vary in terms of content from one document to another, and they have also changed over time. Secondly, the Court of Justice of the European Union,⁸ which has generally dismissed the importance of consumer welfare and has

² The author traces the first Commission reference to the Green Paper on Vertical Restraints. See Commission (EU) ‘Green Paper on Vertical Restraints in EC Competition Policy’ (Green Paper on Vertical Restraints) COM (96) 721 final, 22 January 1997, 17.

³ Case C-53/03 *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] I-04609, [20].

⁴ Joined Cases C-468/06 to C-478/06 *Sot Lelos Kai and others v GlaxoSmithKline AEVE Farmakeftikon Proïonton* [2008] I-07139, [23].

⁵ Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] I-04529, [19].

⁶ The reference in *Syfait* (n 3) came from the Greek competition authority which was unsure about the importance of harm to final consumers and referred this question to the CJEU. The reference for preliminary ruling is indicative of the implications of a lack of a clear standard for the work of national courts and authorities. The reference in this case was dismissed but on other grounds – namely, lack of jurisdiction of the Court.

⁷ It should be noted that references to consumer welfare were introduced exclusively in soft law, not hard law. This creates further complications since the binding nature of the Commission’s soft law in the field of competition law is sometimes put into question. Consider in this respect Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] Electronic Reports of Cases (Court Reports - general), [30] in which the Court held that publication in the C series of the Official Journal is an indication of the non-binding nature of a Commission notice.

⁸ It should be noted that previously, the Court of First Instance signaled a willingness to accept the consumer welfare standard. See Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG and Bank für*

refrained from using or defining the term, has arguably recently had a change of heart. In its judgment in *Post Danmark*, the CJEU for the first time mentioned, but did not define, the term “consumer welfare”⁹ and made a reference to “price, choice, quality, or innovation”,¹⁰ which is the formulation usually used by the Commission to refer to consumer welfare. This was interpreted as showing willingness on the part of the Court to finally recognize consumer welfare after judgments which had put the validity of consumer welfare as a goal for EU competition law into question. In fact, a closer look to the Court’s language in this ruling calls for a more modest interpretation of the Court’s opinion of consumer welfare. This article argues that it is too early to draw conclusions about the actual significance of this change of language and suggests that, if anything, the change in language adds to the existing confusion instead of alleviating it.

The goal of this article is to contribute to the effort of clarifying the meaning of consumer welfare in EU competition law. It discusses in depth the sources of confusion mentioned above and argues that there is a need for an unequivocal definition of consumer welfare. When discussing the notion of consumer welfare as used in the EU, it focuses on two aspects of the consumer welfare question, deemed to be especially unclear: 1) whether “consumer” can be taken to mean final consumer only or the intermediary purchaser and 2) whether the notion of harm primarily refers to price effects. Part 1 focuses on the definition of consumer welfare in economics and in US law. Sub-section 1 considers the economics definition of consumer welfare and tries to derive answers to the question what the meaning of welfare is and whose welfare is to be protected. Sub-section 2 gives a brief account of the introduction of consumer welfare in US antitrust law and why the interpretation of the term is unclear. Parts 2 and 3 bring the focus to the EU. Part 2 examines the definitions of consumer welfare used in the Commission’s soft law and argues that a finding of an end user surplus standard cannot be supported. Part 3 focuses on the practice of the European Courts and addresses the question to what extent an end-user surplus standard is endorsed in the jurisprudence of the European Courts. Part 4 concludes with the finding that although we still do not know exactly what consumer welfare in EU competition law is about, we can certainly discard the end-user surplus standard as a possible answer.

Arbeit und Wirtschaft AG v Commission of the European Communities [2006] ECR II-01601 and Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECR II-02969, [134], [147]. However, the CJEU disagreed with the ruling in the latter case and dismissed the need to prove consumer harm. See Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] I-09291.

⁹ Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] (electronic Reports of Cases).

¹⁰ See *Post Danmark* (ibid), [22]. The exact words of the Courts are “Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.” (references omitted).

PART 1: CONSUMER WELFARE IN LAW AND IN ECONOMICS

1.1. Consumer welfare in economics

Consumer welfare is mostly known as a term from economics, so a lawyer seeking to find the definition consumer welfare is likely to look up the definition of the term in economics. Such a definition will probably be similar to the OECD glossary “standard economic” definition of consumer welfare, which explains the utilitarian logic of the concept and how it is measured in practice:

“Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual’s own assessment of his/her satisfaction, given prices and income. *Exact measurement of consumer welfare therefore requires information about individual preferences. [...] In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare. When measured over all consumers, consumers’ surplus is a measure of aggregate consumer welfare.* In anti-trust applications, some argue that the goal is to maximize consumers’ surplus, while others argue that producer benefits should also be counted.”¹¹

What we notice is that the notion of consumer welfare is in practice linked to another term of art in economics – namely, “consumer surplus”. The OECD glossary also gives a definition of the term ‘consumer surplus’:

“Consumers’ surplus is a measure of consumer welfare and is defined as the excess of social valuation of product over the price actually paid. It is measured by the area of a triangle below a demand curve and above the observed price.”¹²

Welfare is highly subjective because the welfare is linked to the individual’s utility from the consumption of a particular good (an ice cream) or service (a haircut). We might never know the exact magnitude of utility that consumption of these services brings for the particular individual and we would certainly struggle to compare them across individuals. In practice, these difficulties are surmounted by considering how much different individuals would be willing to pay for the particular good or service.

What the lawyer might conclude from this brief research is that consumer welfare is a broad concept accommodating a variety of potentially incommensurable individual preferences, but that in practice it is measured by estimating consumer surplus. Furthermore, the lawyer will be quick to notice that in welfare analysis, the “public good” or the utility of society do not exist separately from the aggregate welfare of the individuals making it up. The public utility or public welfare is measured by summing up the individual utilities of the members of society. In the context of antitrust analysis which is linked to relevant product and geographic markets, this would mean summing

¹¹ R. S. Khemani and D. M. Shapiro (eds), *OECD Glossary of Industrial Organisation Economics and Competition Law* (1993) as seen in *OECD Glossary of Statistical Terms* <<https://stats.oecd.org/glossary/detail.asp?ID=3177>> accessed 7 July 2015 (italics added).

¹² R. S. Khemani and D. M. Shapiro (eds), *OECD Glossary of Industrial Organisation Economics and Competition Law* (1993) as seen in *OECD Glossary of Statistical Terms* <<https://stats.oecd.org/glossary/detail.asp?ID=3176>> accessed 7 July 2015.

up the preferences of individual consumers on *that* particular market, which might well be different from the preferences of society broadly defined.¹³

1.1.1. Surplus v welfare

Consumer surplus as defined above refers to the benefit accruing to the consumers of a product when the price they pay is lower than the maximum amount that they would be willing to spend to purchase the product or service in question.¹⁴ Most of the time a welfare analysis is static in the sense that it only considers the current conditions and the current welfare and not the implications for future welfare.¹⁵ According to this definition, the lawyer would probably consider that “harm” under this standard would mean a reduction in the “wealth” of the consumer because of an increase in prices. Accordingly, consumer “benefit” under this standard would mean an increase in the “wealth” of the consumer by means of a price reduction. Thus, while in theory we aspire to maximizing welfare, in practice, we use price effects as a proxy. In practice, welfare is reduced to a price advantage.

It is worth wondering what is lost when this compromise is made. A lawyer might nonetheless keep in mind that the notion of welfare is broader than the notion of surplus, which means that welfare encompasses more than effects on price¹⁶ or output.¹⁷ What is not clear is how the broader elements of welfare can be brought into antitrust analysis or argument. For instance, the lawyer’s client might claim that price increases will be compensated by improvements in quality or in innovation and claim that these improvements matter to consumers’ utility at least as much as price. What is less clear is how we can include these components into the analysis when they are not captured by a consumer surplus test.

The economics profession has realized these difficulties, but the search for a solution in this respect it is still ongoing. Some economists have cautioned that consumer surplus in and of itself should not be used as a sole consideration as it might lead to unintended effects – namely, to a sacrifice of dynamic efficiency, and that *in practice*, this standard

¹³ See for instance the discussion in Barak Orbach, ‘The Antitrust Consumer Welfare Paradox’ (2010) 7(1) *Journal of Competition Law & Economics* 133. Orbach reiterates the well-known observation that under a welfare analysis the individuals’ preferences might include activities which are judged contrary to the public interest (e.g. tobacco and alcohol use). Such activities might be detrimental to the larger public for instance due to increases in crime and higher public health expenditures. Furthermore, they might also be detrimental to the individual in the long-run. Thus, if we include a time dimension, we might also conclude that the short-term utility from the consumption of such goods might be contrary to the long-term preferences of these very same consumers. However, static welfare analysis only considers present-day effects.

¹⁴ The definition and graphical representation of consumer surplus are widely available in economic textbooks. This author has referred to Edgar Browning and Mark Zupan, *Microeconomics: theory & applications* (John Wiley & Sons, 2009), 101-105; Massimo Motta, *Competition policy: theory and practice* (1st edn, Cambridge University Press, Cambridge, 2004), 18.

¹⁵ Motta notes that a welfare analysis should not necessarily be taken to mean a static analysis, but cautions that “the two things do not necessarily coincide”, namely an authority will have to make a choice in terms of the type of analysis to use. See Motta (n 14), 19.

¹⁶ We should note that price effects and output effects are very much linked. For instance, higher prices can result from an output restriction and vice versa.

¹⁷ Phil Evans, ‘Assessing consumer detriment’ (2007) 28(1) *E.C.L.R.*, 26.

has to be used cautiously or in such a way as to ensure that reliance on the consumer surplus measure does not lead to undesirable results – for instance, to a stifling of innovation and future efficiencies.¹⁸

The difficulty with correcting for this shortcoming of consumer surplus as a tool to measure welfare is the fact that economics does not offer reliable ways of measuring dynamic efficiency.¹⁹ Yet, dynamic efficiency has been recognized as one of the most important factors in economic growth and human progress.²⁰ In this case, the quote attributed to Einstein applies with full force: “Not everything that counts can be counted, and not everything that can be counted counts”.

Finally, the economic notion of “consumer welfare” does not tell us how to balance gains in consumer surplus (which can be measured) with possible future gains in consumer welfare flowing from expected improvements in products or choice. Thus, while consumer welfare tells us what type of harm and what type of benefit are preferred, the question as to how the different types of gains and harms can be measured and compared in a reliable way remains without answer.

1.1.2. Consumer v customer

A competition lawyer would also want to know whose harm or benefit would count in an antitrust or merger case. In this case, the precise meaning of the term consumer is crucial. Disappointingly, the meaning of “consumer” in consumer welfare has proved to be a major source of confusion for lawyers and courts²¹ as well as for academics.²²

¹⁸ Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell, 2010), 31-32. The authors caution: “[I]f regulators treat the pursuit of consumer welfare in an entirely static framework, then this can lead to significantly sub-optimal outcomes. (In particular, problems can arise when the pursuit of consumer welfare leads to an attitude or belief that any profits earned by firms must be at the cost of consumer welfare.) Such an attitude might be reasonable in a static framework such as that outlined above, but is not reasonable in a dynamic framework in which firms invest and innovate to the ultimate benefit of consumers.” See also Dennis Carlton, ‘Does Antitrust Need to be Modernized?’ (2007) 21(3) *Journal of Economic Perspectives*, 155, 157. Carlton notes that “the most significant practical problem with a consumer surplus standard is that, as commonly applied, it tends to favor short-run price reductions over long-run efficiency gains.”

¹⁹ OECD, ‘Dynamic Efficiencies in Merger Analysis’ (Roundtable) (2007) <<http://www.oecd.org/competition/mergers/40623561.pdf>> accessed 7 July 2015. The summary on the cover calls dynamic efficiencies “devilishly difficult to identify and measure.” This point is reiterated in the Executive Summary at 9-11.

²⁰ See OECD, ‘Innovation and Growth: Rationale for an Innovation Strategy’ (2007) <<http://www.oecd.org/science/inno/39374789.pdf>> accessed 7 July 2015; Robert Cooter and Hans-Bernd Schaefer, ‘Solomon’s Knot: How Law Can End the Poverty of Nations’ (Princeton University Press, 2011) available at: <http://works.bepress.com/robert_cooter/156> accessed 7 July 2015. Cooter and Schaefer explain how poor countries’ failure to grow is linked to insufficient innovation in their economies (6). The authors also point out that traditional law and economic theory has neglected the issue of innovation and growth (2).

²¹ In *T-Mobile* (n 5), both the Dutch Court submitting the reference for a preliminary ruling and the defendants in the case on national level made the argument that their agreement to fix the remuneration of dealers was not to be considered anticompetitive because it had no impact on final consumers. See Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, Opinion of AG Kokott, [55]. The Court found the arguments unconvincing. See *T-Mobile* (n 5), [36]. Similarly, the General Court in *GlaxoSmithKline* (n 8) considered consumer welfare to mean final consumer

For the sake of greater clarity, it has been suggested that the term “end-user welfare” be used for when the goal of antitrust is the welfare of the final consumer,²³ as opposed to just another company down the supply chain. The economic definition does not offer the answer, although sometimes in the literature, the consumers are assumed to be the *final* consumers – the “natural persons” walking into a store or going to a website to purchase a good.²⁴ In order to know whose welfare is at stake we need to consider the specific factual situation and economic model at hand. The model might just as well specify that it involves bargaining between two companies with market power or that it involves a monopolist selling to a perfectly competitive market of companies, not individuals.

The distinction between the intermediate purchaser (a firm part of the supply chain) and the consumer, who is buying the product for consumption and not for production, is crucial for those antitrust cases where harm is not suffered directly by final consumers, but for instance for business partners (e.g. producers, agents) or by competitors. For instance, one of the conventional arguments in the debate on buyer power is that when powerful buyers extract surplus from their business partners, we can expect final consumers to benefit: we assume that powerful buyers will act as a check on powerful (or inefficient sellers), push them to lower prices and then pass this benefit down on to the consumer in the form of low prices.²⁵ If consumer welfare simply means purchaser welfare, there is indeed an increase in consumer welfare – because the company-buyer has increased its surplus. However, under a welfare standard concerned with final consumers only, the outcome is uncertain. We cannot immediately conclude if the practice harms final consumers because we do not know if this surplus ever makes it to the final consumer. In order to know this we need to

prices. The ruling was overturned by the Court of Justice on appeal. See Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] I-09291.

- ²² The difference between final and intermediary consumer has been discussed at length in the US antitrust scholarship (see below). In the EU, Pinar Akman has drawn attention to the fact that the differences between an antitrust standard protecting final consumers and an antitrust standard protecting customers or “intermediate purchasers” are not trivial. See Pinar Akman, ‘Consumer’ versus ‘Customer’: The Devil in the Detail’ (2010) 37 (2) *Journal of Law and Society*, 315.
- ²³ Gregory Werden coined the term to distinguish between aggregate welfare and consumer welfare. See Gregory Werden, ‘Monopsony and the Sherman Act: Consumer Welfare in a New Light’ (2007) 74 *Antitrust Law Journal* 707. See also John Shively, ‘When Does Buyer Power Become Monopsony Pricing’ [2012, Fall] *Antitrust Magazine*, 87. Shively writes: “During the period anticipating the Supreme Court’s pronouncement on these issues, another school of thought emerged, arguing that “consumer welfare” should mean “end-user welfare” – the welfare of the sub-set of consumers who are the ultimate purchasers of X+Y Company’s product (and not all consumers generally impacted by allocative inefficiency, as Bork argued).” Shively, 88.
- ²⁴ See for instance Motta (n 14), 20-22. The assumption throughout the discussion on total welfare versus consumer welfare is that the consumers are citizens, not companies. The OECD glossary definitions cited above (n 11, n 12) also suggest that the consumer is an individual.
- ²⁵ The argument goes back to John Galbraith’s theory of countervailing power. See John Galbraith, *American Capitalism: The Concept of Countervailing Power* (Penguin Books, in association with Hamish Hamilton, Harmondsworth, 1963). In the EU, the argument has been made in, among others, Julian Maitland-Walker, ‘Buyer power’ (2000) 21(3) *European Competition Law Review* (Quarterly), 170; Alan Overd, ‘Buyer Power’ (2001) 22 (6) *European Competition Law Review* (Quarterly), 249; A Pera and V Bonfitto ‘Buyer Power in Anti-trust Investigations: A Review’ (2011) 32 *European Competition Law Review* (Quarterly), 414.

conduct a separate analysis in which we examine the competitive conditions under which the firm sells to the consumer.²⁶ In fact, the existence of buyer power is one of the powerful arguments for not applying a consumer welfare standard.²⁷

The requirement of proof of end-user harm has implications for enforcement. Many antitrust cases would probably never materialize if we accept a focus on final consumers only since only a percentage of all companies active in the economy sell directly to final consumers.²⁸ Realistically, the companies that do that are retailers (brick-and-mortar or online), utility companies, phone companies, banks and some other service providers and most of these, with the notable exception of retailers, tend to already be subject to specific regulation with the purpose of safeguarding consumer interest. However, behind every product that reaches the consumer, there is a whole web of inter-relationships that involve *companies only*. An antitrust focus on end-user welfare would mean that most of the abuses occurring along a supply chain would be insulated from antitrust inquiry, unless a concrete impact on final consumers can be shown.

A major difficulty when there is uncertainty about who the customer is relates to measurement. If an antitrust standard is only concerned with *end-user* welfare, does that mean that enforcers should prove that the harm traveled all the way down to the final consumer? The experiences with the calculation of antitrust damages have taught us that estimating the damage to the final consumers can be a complex and expensive exercise.²⁹ Quantification of the damages from a cartel far up the supply chain needs to overcome serious estimation problems, even when it is conducted *ex post* and a lot of information is available. The question is if we should expect antitrust authorities to spend resources on such complicated analysis every time they assess anticompetitive conduct or a merger.

1.1.3. The choice of standard matters

We see from the above that the economic definition of consumer welfare only tells us that the consumer is the purchaser of a good or a service and does not make a distinction between individuals and companies. It also does not explain how to assess tradeoffs between consumers on different relevant product or geographic markets. The consumer welfare standard simply holds that we should maximize welfare. However, it is not clear how we should trade-off welfare increases for urban consumers achieved at

²⁶ Shively (n 23), 88.

²⁷ Dennis Carlton, 'Does Antitrust Need to be Modernized?' (2007) 21(3) Journal of Economic Perspectives, 155. Carlton puts it rather convincingly: "I know of no proponent of the consumer surplus standard who endorses buyer cartels, or who believes that monopsony is not harmful. Instead, proponents of a consumer surplus rule tend to argue that buyer cartels and monopsony are exceptions to the otherwise sensible rule of maximizing consumer surplus. However, the need for these exceptions illustrates the lack of a coherent logic for the consumer surplus standard." See Carlton at 158.

²⁸ A similar point is made by Carlton, who notes that "most transactions in the U.S. economy are between firms" and that virtually all companies are active in the economy both as sellers and as buyers. *Ibid.*, 158.

²⁹ Commission (EU), 'White Paper on Damages actions for breach of the EC antitrust rules' COM (2008) 165 final, 7-8.

the expense of rural consumers or how to trade off the gains to consumers of a higher quality product against the losses to consumers of a lower quality product. However, in practice, it does matter to specify whose welfare counts most in antitrust disputes.

Not making a choice between intermediary and final consumers can lead to serious conceptual inconsistency and confusion among market operators and competition law enforcers as to the correct standard to be applied. When intermediary purchasers are protected under a consumer welfare standard, it becomes difficult to justify the fact that the interest of the same company should be valued more when it is acting as a purchaser than when it is acting as a seller. The discrepancy is apparent if we consider the case of SMEs “squeezed” between powerful suppliers and powerful customers. When buying their inputs, they would be overcharged by powerful sellers; when selling their own wares, their profits would be undermined by the demands of powerful buyers.

Under a consumer welfare standard which does not distinguish between intermediary and final consumers, the SME would be treated differently purely on the basis of its position in the supply chain. In its capacity as a consumer, the company would be protected under the antitrust laws. In its capacity as a seller, however, it would not be. Yet, if we protect only the ability of companies to buy cheaply and do not guard against exploitation they face from their own buyers, we risk putting in question the antitrust enforcement against powerful suppliers. Furthermore, the distinction between buying and selling is sometimes simply a matter of language and interpretation rather than some objective reality. Barak Orbach claims that in many transactions, the roles of buyers and sellers are subject to interpretation, such as in the case of insurance where consumers can be seen as buyers of insurance services or as sellers of risk.³⁰ We can see this in other industries as well. For instance, retailers are traditionally seen as buyers of goods and services, but they also act as suppliers of shelf space and more generally, distribution services. In the case of online search markets, we might also wonder if the consumers should be seen as “sellers” of data or as consumers of online search services.

This distinction is relevant for the decades-long debate as to whether total welfare (the combination of producer and consumer surplus) should be preferred over consumer surplus. The preference for consumer surplus seems to hinge on the assumption that the buyers in the supply-and-demand graph are final consumers, namely ordinary citizens and not corporations. However, when the notion of “consumer” encompasses both individuals and companies, the usefulness of the debate is blurred. The conflict between producer and consumer welfare will therefore be artificial because the conflict will be between the welfare of one company and the welfare of another company.

The present inquiry into the economic definition of consumer welfare, has failed to produce exhaustive answers as to what kind of injury and to whom a consumer welfare standard would seek to prevent. At the same time, the discussion above has highlighted the pitfalls and misunderstanding that a casual interpretation of the term can lead to.

³⁰ See e.g. Orbach (n 13), 139.

This does not mean the economic definition is nonsensical. It simply forces us to realize that the definition used for the purposes of science does not necessarily answer the questions important for law enforcement.

1.2. Consumer welfare and antitrust law

Looking to the legal literature from the US to find out more about the content of EU consumer welfare can also prove to be a confusing experience. EU and US antitrust lawyers are increasingly part of the same community³¹ and consumer welfare is part of their shared vocabulary. EU scholars draw on debates in the US literature and US authors often join the debates in EU competition law. Relying on the US literature is difficult for at least two reasons. Firstly, the debate on the other side of the Atlantic is focused mostly on the distinction between a total welfare standard and a consumer welfare standard so it might not incorporate other considerations which are of greater importance in the EU debates on the goals of competition law.³² The second reason to approach the US literature with care is that the notion of consumer welfare, as originally introduced by Bork, was based on a flawed understanding of terms, which, as will be explained herein, continues to live on in the antitrust scholarship.

Consumer welfare was effectively introduced in antitrust law by law and economics scholar Robert Bork in the late 1960s.³³ The difficulty with Bork's definition is that it misrepresented consumer welfare to mean maximization of total welfare in the sense of maximizing allocative efficiency. When writing about consumer welfare, Bork considered as equal the gains to companies and the gains for consumers.³⁴ Although

³¹ David Gerber explains how the emergence of the “transnational competition law group” had an influence on the receptiveness of the EU Commission to arguments about a more economic approach coming from the US. Gerber (n 1), 1248-1249.

³² Roger Blair and Daniel Sokol, 'Welfare Standards in U.S. and E.U. Antitrust Enforcement' (2012-2013) 81 Fordham L. Rev 2497, 2509-2513. According to Blair and Sokol at 2510: “Unlike in the United States, the divide in Europe has not been between total welfare and consumer welfare. Instead, the divide is between different visions of competition – one based exclusively upon industrial organization economics versus a mix of industrial organization economics and noneconomic political goals.”

³³ According to research by Orbach, the use of the term “consumer welfare” in general was rather modest until the term gained popularity in the 1970s with the rise of the literature on “social regulation”. However, it was thanks to Bork that it was introduced in the antitrust literature. For an in-depth discussion, see Barak Orbach, 'How Antitrust Lost Its Goal' (2012-2013) 81 Fordham L. Rev 2253, 2272-2275. See also Orbach (n 13). To summarize Orbach's findings: in a 1966 publication ('Legislative Intent and the Policy of the Sherman Act' (1966) 9 Journal of Law & Economics), Robert Bork argued that the legislative intent of Congress in creating the Sherman Act was the promotion of consumer welfare. In the 1977 case *Boddicker v. Arizona State Dental Ass'n*, the Ninth Circuit court cited Bork in support of a finding that the goal of the Sherman Act is “serving the public”. This footnote was noticed by the Supreme Court and was cited in its ruling in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). In this case, the first case to recognize consumer welfare as the goal of the competition laws, the Court cited to Bork's 1978 book *The Antitrust Paradox: A Policy at War with Itself* to prove that the goal of Congress in enacting the Sherman Act was to promote consumer welfare.

³⁴ Many have pointed this out, but perhaps the best example comes from Bork himself. For Bork, both monopolists (companies) and natural persons are to be counted consumers. Consider the following statement by Bork: “Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers as a collectivity, does not take this income effect into account.” (emphasis added)

claiming that he relied on economic theory, Bork confused the terms and we know that he specifically did not mean consumer surplus when talking about consumer welfare.³⁵ This “misunderstanding” has been called “the Chicago trap.”³⁶

Bork is perhaps also guilty of the confusion about the relationship between consumer welfare and the concept of “efficiency”. Maximizing consumer welfare has often been equated with maximizing efficiency. However, this proposition can only be true if we clarify that consumer welfare means total welfare and that maximizing efficiency refers to allocative efficiency only.³⁷ For Bork, whose analysis did not consider dynamic efficiency, maximizing “consumer welfare” meant maximizing allocative efficiency without impairing productive efficiency.³⁸

Economists know that efficiency is not the same thing as consumer welfare and that efficiency cannot be reduced to allocative efficiency.³⁹ The fundamental meaning of efficiency – a term used in disciplines beyond economics and also in common language – is, simply put, the best use of a certain means to the achievement of a certain end – an optimization, we might say. Specifically in the economics discipline, three types of efficiencies are recognized: allocative, productive and dynamic. As was discussed above, consumer welfare, represented by the proxy of consumer surplus, is measured in the context of assessing allocative efficiency. Consumer surplus thus represents only one specific aspect of the much broader notion of economic efficiency.

Unfortunately, Bork’s misunderstanding lives on in the competition law literature and it has led to the proliferation of a variety of terms or “proxies” used to mean consumer welfare. Among these “proxies” the most prominent are: efficiency, allocative efficiency, economic welfare, and wealth.⁴⁰ The concurrent usage of these terms

See Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, Inc., New York, 1978), 110. At another point in the text, Bork defines a dead-weight loss (which in economic terms includes a loss in total welfare) as “the amount above costs that consumers would be willing to pay for the lost output”. See *Ibid.*, p. 108.

³⁵ *Ibid.*, 110.

³⁶ We might wonder whether this was a simple misunderstanding or a premeditated ruse. For instance, Katalin Cseres calls it the “Chicago trap”. See Katalin Cseres, *Competition Law and Consumer Protection* (Kluwer Law International, The Hague, 2005), 331-333.

³⁷ Efficiency encompasses dynamic and productive as well as allocative efficiencies. If only static efficiency is maximized, that does not mean that efficiency in general is maximized as there might be an impact on innovation or on productive efficiency cancelling out the positive benefit of the gains in static efficiency.

³⁸ Bork writes: “These two types of efficiency [allocative and productive] make up the overall efficiency that determines the level of our society’s wealth, or consumer welfare. The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.” See Bork (n 34) 91.

³⁹ For a more detailed discussion of the different types of efficiencies, see Motta (n 14), 40-64.

⁴⁰ See for instance, Richard Posner, *Antitrust Law* (2nd edn, University of Chicago Press, 2001), ix. Posner writes in the Preface to the 2001 edition of his book on antitrust: “Almost everyone professionally involved in antitrust today [...] not only agrees that the only goal of the antitrust laws should be to promote economic welfare, [but also agrees on the essential tents of economic theory that should be used to determine the consistency of specific business practices with that goal]. Agrees, that is, that economic welfare should be understood in terms of the economist’s concept of efficiency [...]”. (emphasis added); See also Herbert Hovenkamp, ‘Distributive Justice and Consumer Welfare in Antitrust’ (2011) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873463 > accessed 7 July 2015, 1.

without precise definition is arguably confusing to economists and non-economists alike.

In the US, the meaning of consumer welfare is open to speculation in great part because the US Supreme Court, which has mentioned consumer welfare a couple of times,⁴¹ has never explained their understanding of the concept.⁴² The lack of clear and consistent understanding of consumer welfare by the US Supreme Court has fuelled the interest of academics for the past three decades and has resulted in a great body of literature and a number of interpretations of the term. To this day, however, there is no consensus – not among academics, and not in terms of case law – as to how consumer welfare is to be understood in US antitrust⁴³ and there are doubts as to the extent the discussion makes any sense in practice.⁴⁴

After consumer welfare was imported as a goal of EU competition law, EU scholars have also raised questions about the implications of the change with respect to the traditional European values of competition and economic freedom as well as what consumer welfare entails and whether the standard is total or consumer welfare.⁴⁵ What we see is that contrary to the original expectations about clarity, the introduction of consumer welfare has resulted in much uncertainty as to what the EU competition law standard of assessment is about.

⁴¹ Gregory Werden identifies only five US Supreme Court majority opinions in which consumer welfare was mentioned, namely *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (1979); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984), *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221, 224 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077 (2007); and *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722, 2724 (2007). See Werden (n 23), 721.

⁴² See Orbach (2012-2013), (n 33) and Orbach (n 13); Werden (n 23); J. Thomas Rosch, 'Monopsony and the Meaning of "Consumer Welfare": A Closer Look at Weyerhaeuser' (paper presented at the Milton Handler Annual Antitrust Review in New York, NY, USA on 7 December 2006) <<https://www.ftc.gov/public-statements/2006/12/monopsony-and-meaning-consumer-welfare-closer-look-weyerhaeuser>> accessed 7 July 2015.

⁴³ Barak Orbach has been adamant in drawing attention to this fact. See Barak Orbach, 'Foreword: Antitrust's Pursuit of Purpose' (2012-2013) 81 Fordham L Rev, 215; Orbach (n 13); Orbach (n 33); Eleanor Fox, 'Against Goals' (2012-2013) 81 Fordham L Rev, 2157; Alan Meese, 'Reframing the (False) Choice between Purchaser Welfare and Total Welfare' (2012-2013) 81 Fordham L Rev, 2197. See also Blair and Sokol (n 32), especially at 2056-2509.

⁴⁴ Fox (n 43); David Hyman and William Kovacic, 'Institutional Design, Agency Life Cycle, and the Goals of Competition Law' (2012-2013) 81 Fordham L Rev, 2163.

⁴⁵ Evans (n 17); Christopher Townley, 'Which Goals Count in Article 101 TFEU? Public Policy and Its Discontents: the OFT's Roundtable Discussion on Article 101(3) of the Treaty on the Functioning of the European Union' (2011) 32(9) European Competition Law Review; Oles Andriychuk, 'Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process' (2010) 6(3) European Competition Journal; P Akman, 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29(2) Oxford Journal of Legal Studies, 267; P Akman, 'Consumer Welfare' and Article 82EC: Practice and Rhetoric' (2009) 32(1) World Competition 71; Pinar Akman (n 22); Liza Gormsen, 'The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3(2), European Competition Journal, 329; Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2(2) Competition Policy International, 197.

PART 2: THE COMMISSION'S APPROACH TO CONSUMER WELFARE

2.1. Defining consumer welfare

The first references to consumer welfare in EU competition law appeared in the 1997 Green Paper on Vertical Restraints.⁴⁶ The definition given in that document implied an end-user surplus standard, namely a focus on the benefit to final consumers resulting from lower prices:

“To further the interest of the consumer is at the heart of competition policy. Effective competition is the best guarantee for consumers to be able to buy good quality products at the lowest possible prices. *Whenever in this green paper the introduction or protection of effective competition is mentioned, the protection of the consumer's interest by ensuring low prices is implied.*”⁴⁷

The definition of the term, however, was enriched with the launch of the modernization package in 2004. In the 2004 Notice on the application of the former Article 81(3) EC,⁴⁸ the Commission presented consumer welfare *and* allocative efficiency as the goals of Article 101 TFEU.⁴⁹ The same proclamations appeared in the Guidelines on the application of the former Article 81 EC to technology transfer agreements (2004)⁵⁰ and in the Merger Guidelines (2004).⁵¹ These goals were repeated the 2005 Discussion Paper on the former Article 82 EC and in the Commission's submission to the 2005 OECD Roundtable on competition on the merits.⁵²

⁴⁶ Commission (EU), ‘Green Paper on Vertical Restraints in EC Competition Policy’ (Green Paper on Vertical Restraints) COM (96) 721 final, 22 January 1997, 17.

⁴⁷ *Ibid.*, 17 (italics added).

⁴⁸ Commission (EU), Notice: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.

⁴⁹ *Ibid.*, [13]. It is stated: “The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.” Roughly the same statement is inserted in the Commission (EU), Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C101/2, [5]: “The aim of Article 81 as a whole is to protect competition on the market with a view to promoting consumer welfare and an efficient allocation of resources.” See para 13 of the Notice: “The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.”

⁵⁰ See Commission (EU), Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C101/2, [7]: “Indeed, both bodies of law [competition law and intellectual property rights law] share the same basic objective of promoting consumer welfare and an efficient allocation of resources.” Interestingly, this proposition was slightly rephrased in the 2011 Guidelines on cooperation agreements to convey that both intellectual property laws and competition law pursue “the same objectives of promoting *innovation and enhancing consumer welfare*.” (italics added). Arguably, this is more in line with the recent focus on innovation. See Commission (EU), Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 at [269].

⁵¹ Commission (EU), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03, [8]. However, there is no explicit mention of consumer welfare as the goal of EU merger policy in the Merger Regulation.

⁵² The Commission states: “With regard to exclusionary abuses the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient

Such a formulation of consumer welfare corresponds to the one championed by Bork – namely, a total welfare standard based on allocative efficiency considerations. Therefore, it is not surprising that commentators interpreted this as indicative of an Americanization of EU competition law and of an adoption of the Chicago School approach to antitrust.⁵³ The question remains as to whether such conclusions were justified in practice.⁵⁴ What has the proclamation of consumer welfare meant for the Commission’s definition of harm and a victim of harm? Given the many definitions and their evolution over time, establishing a positive answer is a difficult task. For this reason, the following sections will limit themselves to verifying whether the Commission’s approach could be reduced to end-user surplus.

2.2. Protecting consumers and customers alike

In principle, the EU competition law notion of “consumer welfare” should not be reduced to end-user welfare.⁵⁵ In EU competition law, “consumers” encompasses both intermediate consumers or “customers” and final consumers. Whether the consumer is a multinational supermarket chain or the average person going to the supermarket to buy a carton of milk should not matter – both are considered consumers for the purposes of EU competition law. The Commission has not necessarily been explicit about this fact, but has not hidden it very well either. The distinction is explained in the Commission’s 2004 Notice on the application of Article 81(3):

“The concept of ‘consumers’ encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other

allocation of resources.” See Commission (EU), DG Competition, *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses* [2005] <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> accessed 7 July 2015, [4]. See also the submission by the European Commission in OECD, “Policy Roundtable: Competition on the Merits” (2005) 27 DAF/COMP <<http://www.oecd.org/competition/abuse/35911017.pdf>> accessed 7 July 2015, 221. The Commission submitted: “As in [the modernised policy regarding mergers and restrictive agreements and practices], the *protection of competition on the market as a means of enhancing consumer welfare* and of ensuring an efficient allocation of resources should be put at the centre of competition policy regarding the application of Art. 82.” (italics in the original).

⁵³ In a widely read and cited article, Andreas Weitbrecht made a claim that a rapprochement between the EU competition law regime and the US antitrust regime was taking place and that EU competition law was becoming Americanized. Weitbrecht does mention that the Commission adopted “*its own version* of the consumer welfare approach developed by the Chicago School” (at 85, italics added) and that “In making this transition, EC competition law has been heavily influenced by the development in the United States, in particular the Chicago School, *while retaining its own characteristics and identity*.” (at 81, italics added). See Andreas Weitbrecht, ‘From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law’ (2008) 29(2) *European Competition Law Review*, 81-88.

⁵⁴ See P Akman, ‘Consumer Welfare’ and Article 82EC: Practice and Rhetoric’ (2009) 32(1) *World Competition* 71. In this article, Akman argued that the use of “consumer welfare” by the Commission seems to be a rhetorical device rather than a real standard applied in the Commission’s practice.

⁵⁵ Nonetheless, it has taken some time before the distinction between customer and consumer was noticed. Consider, for example, the questions in the preliminary ruling in *T-Mobile* (n 5). Many did not realize that consumers meant not just final consumers but intermediary ones as well. Akman has drawn attention to this fact in several articles. See Akman (n 22) and Akman (n 54).

words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.”⁵⁶

The same interpretation is maintained in the 2011 Guidelines on horizontal cooperation agreements⁵⁷ and in the 2004 Merger Control Regulation and Guidelines.⁵⁸ The formulation of consumer welfare in law and in soft law therefore rules out an *end-user* interpretation. The benefits accruing to the companies along the supply chain are to be counted just as much as the benefits accruing to the final users of the product.

This conclusion is borne out not only by a textual analysis but also by the approach taken by the Commission in its practice. Certainly in merger decisions, end-user welfare is put in question when we consider the Commission’s assessment methodology. As part of the process of gathering data to inform a merger decision, the Commission conducts market investigations by means of surveying the competitors and the customers of the merging companies (e.g. the direct buyers of the company’s products). The harm estimated is the harm to these intermediary companies, not necessarily the harm to final consumers.

In order to stay true to an end-user analysis, the Commission would have to ask parties to show the likelihood that the merger benefits (or harms) “trickle down” to the final consumers and do not get “absorbed” by the companies down the supply chain. This would be a complicated task for parties as it would require the consideration of the market structure and dynamics on the next market – the one in which the customers act as sellers toward the final consumers. For smaller, less wealthy claimants, establishing the likelihood of downstream consumer harm might be prohibitively expensive. Similar problems would arise for national competition authorities with limited budgets. Yet this would be the only way to honor a consumer welfare standard which puts the final consumers at the heart of analysis.

2.3. Consumer surplus or a broader notion of welfare?

The Commission has given reason to think that it prefers a narrow consumer surplus standard. Although it has stated that consumer welfare includes not just price, but also

⁵⁶ Commission (EU), Notice: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, [84].

⁵⁷ Commission (EU), Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, [49].

⁵⁸ Article 2 (1) b of the Council Regulation (EU) No 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1. Also mentioned in the accompanying Merger Guidelines: “Pursuant to Article 2(1)(b), the concept of ‘consumers’ encompasses intermediate and ultimate consumers, i.e. users of the products covered by the merger. In other words, consumers within the meaning of this provision include the customers, potential and/or actual, of the parties to the merger.” See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, endnote 105.

considerations such as quality, choice, and innovation, on several occasions the Commission has chosen to use price effects as “shorthand” for all these parameters.⁵⁹

Recent statements from the Commission suggest that the emphasis on prices and output in the 2004 Notice and in the 2009 Guidance paper might be short-lived. Recently, we see fewer statements from the Commission claiming that consumer welfare is *the (ultimate)* goal of (EU) competition law. More and more, the Commission seems to prefer formulating consumer welfare in terms of price, quality, and choice. The change in language can be observed in several of the more recent guidelines and notices issued by the Commission. For instance, the 2010 Block Exemption Regulation on Vertical Restraints⁶⁰ and the guidelines⁶¹ accompanying it contain no specific reference to consumer welfare. Similarly, the 2011 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements⁶² mention consumer welfare explicitly only once, and this reference is inserted awkwardly in the specific case of standardization agreements.⁶³

Also, in the 2010 Regulation exempting R & D agreements from the application of Art 101(1) TFEU,⁶⁴ we do not find the statement that the objective of EU competition law is the promotion of consumer welfare. Instead, the Regulation does mention that R & D can bring benefits to consumers in the form of lower prices, improved products or services, or “quicker launch” of such products.⁶⁵ However, this is by no means presented as *the* goal of competition law.

What is the meaning of this change? It certainly does not mean that the consumer welfare standard has disappeared: however, it is seen more and more in its formulation as “price, quality and choice”. This makes a lot of sense given the Commission’s growing desire to promote competitiveness and encourage innovation. One might think

⁵⁹ See Commission (EU), Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, [11] and Commission (EU), Notice: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, endnote 84. In the latter, the Commission states “In this Communication, the expression ‘*increase prices*’ includes the power to maintain prices above the competitive level and is used as short hand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers.” (italics added).

⁶⁰ Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice [2010] OJ L 102/1.

⁶¹ Commission (EU), Guidelines on Vertical Restraints [2010] OJ C 130/01.

⁶² Commission (EU), Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1.

⁶³ See *Ibid.*, [269] where the Commission notes: “Intellectual property laws and competition laws share the same objectives of promoting innovation and enhancing consumer welfare.” (footnote omitted).

⁶⁴ Commission Regulation (EU) No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L 335/36.

⁶⁵ Commission Regulation (EU) No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L 335/36, [10].

that industrial policy considerations are displacing the more traditional allocative efficiency considerations. It is interesting to consider the statement in the Staff Working Paper accompanying the 2011 Report on Competition Policy:

“EU competition policy aims at achieving three main objectives: i) protecting competition on the market as a means of enhancing consumer welfare, ii) supporting growth, jobs and the competitiveness of the EU economy and iii) fostering a competition culture.”⁶⁶

Curiously, consumer welfare is no longer the ultimate or primary goal, but rather one of the goals of EU competition policy and it appears on equal footing with industrial policy goals. Unsurprisingly, these other goals are aligned with EU’s 2020 agenda and focus on growth and competitiveness.⁶⁷ This trend has continued. In a speech before the Global Competition Law Centre in Bruges in January 2014, former Competition Commissioner Joaquín Almunia barely mentioned impact on consumers and consumer benefits as goal of competition policy.⁶⁸ Rather, he focused on underlining the importance of vigorous competition law enforcement for stimulating the EU’s global competitiveness, growth, investment and innovation.⁶⁹ Given this change in language, it is no longer possible to accept that the Commission understands consumer welfare, or the goals of competition law for that matter, as a narrow consumer surplus standard. Rather, such statements prompt us to think that competition policy is not an independent legal discipline in the EU but a strategic tool, influenced by the broader objectives of the Union – and that it has a regulatory agenda.

It is outside the scope of this paper to verify in what way the Commission’s decisions have supported growth and jobs. But there are some Commission’s decisions in cases involving IT markets which exemplify how the Commission’s concerns about choice and innovation can prevail over considerations about price. The tying claims in the Commission’s 2004 *Microsoft* decision⁷⁰ expressed a concern with the disappearing from the market of other types of media players and thereby the limitation of choice and

⁶⁶ Commission (EU), ‘Commission Staff Working Paper Accompanying the Report on Competition Policy 2011’ SWD (2012) 141 final < http://ec.europa.eu/competition/publications/annual_report/2011/part2_en.pdf > accessed 7 July 2015, 3.

⁶⁷ Commission (EU), ‘Report on Competition Policy 2011’ COM (2012) 253 final <http://ec.europa.eu/competition/publications/annual_report/2011/part1_en.pdf> accessed 7 July 2015, 9-10. The Commission notes: “[A] major part of the Commission’s actions in the field of competition policy and enforcement in 2011 addressed the effects of the crisis in the financial markets. Nevertheless, competition enforcement and advocacy also serve *other wider longer-term objectives such as enhancing consumer welfare, supporting the EU’s growth, jobs and competitiveness in line with the Europe 2020 Strategy for smart, sustainable and inclusive growth.*” (italics added)

⁶⁸ Curiously, in one of the three times the former Commissioner used the word “consumer”, he clarified that consumers refers to both final consumers and intermediary purchasers. In his own words: “Firms that set up cartels directly impose higher prices on their customers – whether they be final consumers or other companies along the value chain.” Joaquín Almunia, “Competition policy for the post-crisis world: A perspective” (Speech/14/34, 17 January 2014, Bruges, Belgium) < http://europa.eu/rapid/press-release_SPEECH-14-34_en.htm > accessed 7 July 2015.

⁶⁹ Ibid.

⁷⁰ Commission Decision relating to a proceeding under Article 82 of the EC Treaty - Case COMP/C-3/37.792 *Microsoft* C (2004)900 final.

innovation.⁷¹ But where was the (monetary) harm to consumers?⁷² Certainly, most consumers were happy to use Microsoft's Media Player free of charge and were in any case free to download the additional media players they might have wanted. Although the Commission phrased the infringement in terms of "consumer harm", we can read the *Microsoft* decision as one protecting the competitors' *possibility to sell* an alternative product rather than as one protecting consumers from price hikes.

Similarly, in the subsequent Commission decision against Microsoft, in 2009, which was related to the tying of Internet Explorer to Windows, the Commission once again considered the stifling effects of the practice on innovation and choice.⁷³ Even though there was no monetary harm involved to users and despite the fact that many consumers were happy with Internet Explorer or were not concerned about its quality, the preservation of a variety of products on the market and the continued existence of possible innovators were considered important on their own.⁷⁴ Similar concerns about preserving choice and innovation are visible in the Commission's negotiation with Google.⁷⁵

Whether innovation considerations trump concerns about price in the Commission's welfare calculus, we cannot tell with certainty. At the same time, it is rather unlikely that the opposite is true. What we do see is that end-user surplus is certainly not all that matters. Even in more traditional sectors, the Commission is concerned with choice

⁷¹ Microsoft had raised the counter-argument that there was no harm in the tying of Media Player with Microsoft Windows precisely because the product was offered free of charge. The Commission stated: "It will be shown in the following section (recital (835) et seq.) that the harmful effects on consumers from tying WMP (also) derive from undermining the structure of competition in media players which is liable to result in deterrence of innovation and eventual reduction in choice of competing media players." See *Ibid.*, [832]. The Commission notes: "In particular, it will be shown that inasmuch as tying risks foreclosing competitors, it is immaterial that consumers are not forced to "purchase" or "use" WMP. As long as consumers "automatically" obtain WMP - even if for free - alternative suppliers are at a competitive disadvantage." at [833].

⁷² It is perhaps worth noting that during the period of alleged abuse, some competing products actually cost money to download. For instance, Real Network's 2004 *RealPlayer10* had a basic version for free and premium version costing USD 19.95. Also, in the 1990s, none of Apple's media players were for free. See *Ibid.*, [125-140].

⁷³ Commission Decision of 16.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case COMP/C-3/39.530 – Microsoft (tying). The emphasis in the decision was on the foreclosure rather than on the consumer harm: "In particular, the Commission provisionally considered [...] that the tying was liable to foreclose competition on the merits between web browsers. The Commission also took the preliminary view that the tying of Internet Explorer, in addition to reinforcing Microsoft's position on the market for client PC operating systems, created artificial incentives for web developers and software designers to optimise their products primarily for Internet Explorer" at [36-37].

⁷⁴ *Ibid.* The Commission had a consultancy carry out a customer survey which concluded that most consumers suffered from an "information deficit" regarding Internet browsers, e.g. at [52]. The survey concluded that most consumers using Internet Explorer either did not know how to or did not want to change browsers.

⁷⁵ In relation to the Google case, Joaquín Almunia, former Commissioner for Competition, has stated: "As you know, antitrust enforcement is about consumer welfare, innovation and choice, not about protecting competitors." See Joaquín Almunia, "The Google antitrust case: what is at stake?" European Commission (Speech/13/768 delivered before the European Parliament, 1 October 2013, Brussels, Belgium) <http://europa.eu/rapid/press-release_SPEECH-13-768_en.htm> accessed 7 July 2015.

and innovation and considers them on at least equal footing as price effects.⁷⁶ As the Commission enforcement ventures into industries where future investments, innovation and quality improvements are key, it seems even less likely that we will see a narrow consumer surplus approach.

PART 3: CONSUMER WELFARE AND THE COMMUNITY COURTS

3.1. Consumer welfare before the Community Courts

After the introduction of consumer welfare as a goal of EU competition law by the Commission, there was much anticipation as to whether the new vision would be endorsed by the Courts. Consumer welfare enthusiasts found a source of optimism in two cases, *Österreichische Postsparkasse*⁷⁷ and *GlaxoSmithKline*,⁷⁸ in which the General Court inched in to endorsing something which could be interpreted to mean consumer welfare. The first such affirmation appeared in the 2006 decision of the General Court in *Österreichische Postsparkasse*.⁷⁹ The case arose in reaction to a decision by the Commission's Hearing Officer to grant access to the non-confidential versions of the statements of objections to an interested third party. The interested party in this case was an Austrian political party (FPÖ) and the statement of objections concerned a price-fixing cartel among banks in Austria. FPÖ's requirement was arguably politically motivated – with the goal of discovering about certain individuals' involvement in the conspiracy. The argument officially submitted by the FPÖ, however, was that as a consumer of banking services, it had a legitimate interest in the proceedings.⁸⁰ The Commission accepted this argument. Upon appeal, the General Court concurred with the Commission in this regard and held:

“It should be pointed out in this respect that the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase *the well-being of consumers*. That purpose can be seen in particular from the wording of Article 81 EC. Whilst the prohibition laid down in Article 81(1) EC may be declared inapplicable in the case of cartels which contribute to improving the production or distribution of the goods in question or to promoting technical or economic progress, that possibility, for which provision is made in Article

⁷⁶ In 2012, the Commission (DG COMP) issued a call for tender for the study of the impact of concentration on choice and innovation in the food sector. See Press Release, “Competition: Commission launches study on choice and innovation in food sector” (11 December 2012, Brussels, Belgium) <http://europa.eu/rapid/press-release_IP-12-1356_en.htm> accessed 7 July 2015. The results of the study were made available in October 2014. See Press Release, “Competition: Commission publishes results of retail food study” (2 October 2014, Brussels, Belgium) <http://europa.eu/rapid/press-release_IP-14-1080_en.htm> accessed 7 July 2015.

⁷⁷ *Österreichische Postsparkasse* (n 8).

⁷⁸ Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECR II-02969.

⁷⁹ *Österreichische Postsparkasse* (n 8).

⁸⁰ The Commission argued that FPÖ as a consumer of the banking services affected by the cartel had a legitimate interest in submitting the application for access and that the purpose of the competition rules was the protection of consumers. See *Ibid.*, [102-103].

81(3) EC, is *inter alia* subject to the condition that a fair share of the resulting benefit is allowed for users of those products.”⁸¹

We might be surprised about the term “well-being of consumers”, but the wording is mostly due to translation. Consumer welfare and “well-being of consumers” could be synonyms, although, as discussed above, “consumer welfare” is a technical term for the purposes of economics, while well-being is not. The French version of the decision speaks of *bien-être du consommateur* which is the French economic term for consumer welfare. This is also the term used in the French language versions of soft-law instruments such as the 2004 Notice on the application of the former Article 81(3),⁸² and the Guidance on the Commission’s enforcement priorities in applying Article 102.⁸³ It is thus possible to conclude that the Court actually meant consumer welfare instead of a more general notion of well-being. Even if that is the case, however, the Court did not actually define the term, but instead linked its meaning to the wording of Article 101(3), thus implying that whatever consumer welfare might be, it is to be interpreted in light of this provision, which does not provide further guidance on the actual meaning of the term.

This finding must be contrasted with the judgment in *GlaxoSmithKline* in 2006. In this case, the General Court was a lot more specific in explaining what it understood to be a restriction of consumer welfare. The case concerned GlaxoSmithKline’s action for annulment of a Commission decision claiming it had infringed Art 101 TFEU by limiting parallel trade. The General Court, referring to the decision in *Österreichische Postsparkasse* and to *Consten and Grundig* and *Tepea v Commission*,⁸⁴ declared that the objective of Article 81(1) EC (currently Article 101(1) TFEU) was “to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question.”⁸⁵ Given this objective, the Court reasoned that a restriction of parallel trade cannot in and of itself mean that consumer welfare was decreased.⁸⁶ In this case, the Court found that the

⁸¹ The General Court stated: “It should be pointed out in this respect that the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers.” *Ibid.*, [115]. (emphasis added)

⁸² Commission (EU), Notice: Lignes directrices concernant l'application de l'article 81, paragraphe 3, du traité [2004] OJ C 101/97, [13, 21, 33, 104].

⁸³ Commission (EU), Orientations sur les priorités retenues par la Commission pour l'application de l'article 82 du traité CE aux pratiques d'éviction abusives des entreprises dominantes [2009] OJ C 45/7 [19, 30, 86].

⁸⁴ Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] English special edition Reports of Cases 1966-00299; Case 28/77 *Tepea BV v Commission of the European Communities* [1978] ECR 01391. The reference to these cases is strange, because they are respectively from 1966 and 1978. As explained in the beginning of the chapter, consumer welfare was rather unknown as a concept at the time. To give a sense of perspective, Bork’s book was published in 1978 and the US Supreme Court endorsed consumer welfare in *Reiter v. Sonotone Corp* (supra) in 1979.

⁸⁵ *GlaxoSmithKline* (n 78).

⁸⁶ *Ibid.*, [119] and [147]. The Court stated: “Consequently, the application of Article 81(1) EC to the present case *cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines or to partition the common market*, which leads to the conclusion that it affects trade between Member States, *but*

Commission had not established that an obstruction of parallel trade would limit consumer welfare, in the sense of preventing consumers from obtaining lower prices.⁸⁷ In doing so, the General Court affirmed consumer welfare as the ultimate goal of the EU competition rules to the detriment of the internal market goal, which has been well established in its case-law. As to consumer welfare, the Court seemed to adopt a narrow *end-user surplus* standard – namely, the harm is a price decrease and the consumer here is the “final consumer of the products in question”.⁸⁸

This rather revolutionary interpretation, however, was struck down by the Court of Justice. With the *GlaxoSmithKline* decision of 6 October 2009,⁸⁹ the ECJ rejected the need to prove consumer harm as a pre-condition to finding a restriction of competition by effect and affirmed that the goal of competition policy is protecting competition as such.⁹⁰ Although the Court did not outright reject the value of consumer welfare, it significantly downplayed both its practical and normative value:

“First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of *certain advantages* may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect *not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such*. Consequently, for a finding that an agreement has an anti-competitive object, *it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price*.”⁹¹

The above quotation does not tell us how the Court understands consumer welfare, but it does give an indication of what would *not* be accepted by the Court: primacy of consumer welfare and consumer welfare in the sense of consumer surplus. The Court does not explicitly refer to consumer welfare and does not explain what “consumer interests” might mean precisely. Firstly, the Court speaks of “certain advantages” which very likely refers to the General Court’s requirement that price decreases be shown. The

also requires an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer.” (emphasis added).

⁸⁷ The Court explained: “Consequently, the principal conclusion reached by the Commission, namely that Clause 4 of the General Sales Conditions must be considered to be prohibited by Article 81(1) EC in so far it has as its object the restriction of parallel trade, cannot be upheld. *As the prices of the medicines concerned are to a large extent shielded from the free play of supply and demand owing to the applicable regulations and are set or controlled by the public authorities, it cannot be taken for granted at the outset that parallel trade tends to reduce those prices and thus to increase the welfare of final consumers.* An analysis of the terms of Clause 4 of the General Sales Conditions, carried out in that context, therefore does not permit the presumption that that provision, which seeks to limit parallel trade, thus tends to diminish the welfare of final consumers. In this largely unprecedented situation, it cannot be inferred merely from a reading of the terms of that agreement, in its context, that the agreement is restrictive of competition, and it is therefore necessary to consider the effects of the agreement, if only to ascertain what the regulatory authority was able to apprehend on the basis of such a reading.” *Ibid.*, [147] (emphasis added).

⁸⁸ *Ibid.*, [118].

⁸⁹ Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] I-09291.

⁹⁰ *Ibid.*, [63].

⁹¹ *Ibid.*, [63] (footnotes omitted, emphasis added)

statement can thus be interpreted as a rejection of a narrow construction of consumer interest – namely, with respect only to price. As will be argued below, the Court has consistently placed value on other aspects of consumer well-being, including choice and innovation. Secondly, the Court held that the protection of consumer *interests* is not the only, nor the primary goal of EU competition law: the “other goals”, including the proverbial protection of competitors and “structure of the market” continued to play a role in defining which conduct is anti-competitive for the purposes of EU competition law.

Courts are arguably careful with language and the inclusion of “not only” instead of an outright “no”, and the choice for the term “consumer interest” instead of “consumer welfare”, as well as the persistence of references to the importance of market structure and protection of competitors should not be seen as random nor as coincidental. Yet slippages do occur even in judgments by high courts and translation can alter the content of a text, so we need to seek further confirmation of this finding in the case law. Such a confirmation is available. Both before⁹² and after the *GlaxoSmithKline* decision, the Court of Justice has been consistent in holding that proving harm to consumers, consumer welfare or consumer interest is superfluous.⁹³ Given this strong trend, the Court has maintained a traditional approach toward the goals of competition policy, thus raising questions about the validity or importance of consumer welfare as a goal.

An opportunity to re-open the debate on whether the Court has accepted consumer welfare or not presented itself with the *Post Danmark* decision of 2012.⁹⁴ This was the first time that the Court of Justice made a concrete reference to consumer welfare as such.⁹⁵ It should be noted that the language of the Court of Justice was nowhere as firm as the statements of the General Court in *Österreichische Postsparkasse* and the 2006 *GlaxoSmithKline* decision. Nonetheless, *Post Danmark* was quickly saluted as a case which deviates from the traditional line of the Court by aligning itself to the Commission’s Guidance Paper and by showing a warming up to the goal of consumer welfare.⁹⁶ Rousseva and Marquis find hopefulness for the Commission’s consumer welfare

⁹² Case C-95/04 P *British Airways plc v Commission of the European Communities* [2007] ECR I-02331; Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of the European Communities* [2009] ECR II-03155; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission of the European Communities* [2006] ECR I-08725; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-08637; C-125/07 P *Erste Group Bank AG* (C-125/07 P), *Raiffeisen Zentralbank Österreich AG* (C-133/07 P), *Bank Austria Creditanstalt AG* (C-135/07 P) and *Österreichische Volksbanken AG* (C-137/07 P) *v Commission of the European Communities* [2009] ECR I-08681.

⁹³ Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECR I-02369; Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] I-09555; Case C-52/09 *Konkurrensverket v Telia Sonera Sverige AB* [2011] ECR I-00527.

⁹⁴ Case C-209/10 *Post Danmark A/S v Konkurrenserådet* [2012] (electronic Reports of Cases).

⁹⁵ *Ibid.*, [42]. See also Blair and Sokol (n 32), 2511.

⁹⁶ See Ekaterina Rousseva and Mel Marquis, “Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU” (2012) *Journal of European Competition Law & Practice* < <http://jeclap.oxfordjournals.org/content/early/2012/10/25/jeclap.lps059.full> > accessed 7 July 2015.

standard because of the Court's use of references to consumer detriment and consumer interest in the judgment.⁹⁷ The fact that the decision was delivered in Grand Chamber added weight to the belief that the Court was prepared to embrace change on the consumer welfare question.

Still, the judgment does not give us a firm answer about the meaning of consumer welfare that the Court is prepared to accept, nor the standard of proof that this would imply. The link between the Court's allusions to "price, choice, quality or innovation" and the concept of consumer welfare is tenuous. Unlike the General Court's interpretation of consumer welfare as end-user surplus in *GlaxoSmithKline*, the Court of Justice in *Post Danmark* did not make a connection between the notion of consumer welfare and these aspects of consumer interest, but simply stated that these are qualities of a company's offer that are important to consumers.⁹⁸ It should also be noted that the Court said "among other things" which implies that these are mere examples of what consumers might value, but not an exhaustive list. Accepting that this is what competition law is about thus remains a plausible, though far from indubitable, interpretation.

In the recent *Intel* decision,⁹⁹ the General Court was faced again with arguments that the Commission needs to prove the anti-competitive effect of the allegedly unlawful practices. The General Court, in a decision, which quickly earned fame as yet another brush-off of the more economic approach,¹⁰⁰ rejected these arguments. In particular, the Court found that it was not necessary for the Commission to show consumer harm:

"[T]he Court would point out that, a fortiori, the Commission is not required to prove either direct damage to consumers or a causal link between such damage and the practices at issue in the contested decision. It is apparent from the case-law that Article 82 EC is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure."¹⁰¹

⁹⁷ *Ibid.*, 11.

⁹⁸ See *Post Danmark* (n 94) at [22]: "Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation."

⁹⁹ Case T-286/09 *Intel Corporation v Commission* [2014] ECLI:EU:T:2014:547.

¹⁰⁰ See for instance the post in the popular EU competition law blog "Chillin' Competition". Alfonso Lamadrid, "Breaking news- The Intel Judgment is out: the European Commission wins" (12 June 2014) <<http://chillingcompetition.com/2014/06/12/breaking-news-the-intel-judgment-is-out-the-european-commission-wins/>> accessed 7 July 2015 ; Herbert Smith Freehills LLP, "General Court Ruling in the Intel Appeal – Where Now for an Effects Based Approach to Rebates Under Article 102 TFEU?" (12 June 2014) *Competition, Trade and Regulation E-Bulletin* < <http://www.herbertsmithfreehills.com/-/media/Files/ebulletins/2014/20140612%20-%20General%20Court%20ruling%20in%20the%20Intel%20appeal%20%20where%20now%20for%20an%20effects%20based%20approach%20to%20rebates%20under%20Article%20102%20TFEU.htm>> accessed 7 July 2015.

¹⁰¹ *Intel* (n 99), [105] and referring to *British Airways* (n 92). See *Intel* (n 99), [308] where the Court states that the ability by Intel to provide "[p]roof of actual foreclosure, of AMD's capacity constraints, of AMD's marketing, of AMD's technical performance or of harm to consumers" would not have been exculpatory since they are not required for establishing the unlawfulness of its conduct.

The Court further rejected the significance of consumer harm for determining the level of the fine.¹⁰² Intel claimed that in the period relevant for the decision there had in fact been vigorous competition between Intel and AMD, which had “resulted in constantly falling prices and improving product quality, to the benefit of consumers.”¹⁰³ This argument, as well as the other arguments related to the importance of assessing the impact on consumers, were not accepted by the General Court.

Does that mean the mention of consumer welfare in *Post Danmark* is already irrelevant? Perhaps not, although it does detract from whatever support that judgment gave to consumer welfare as a goal. It seems that given the body of case law from recent years rejecting the need for proving consumer harm, we may draw the preliminary conclusion that it is too early to celebrate consumer welfare’s victory.

3.2. Harm to customers, consumers and producers

In reaching conclusions about the Court’s thinking on consumer harm, we should consider not only that the Court has rejected the need for consumer harm, but also the fact that the Court has acknowledged that the harm experienced by producers or by business partners is just as important. This trend has not changed with the introduction of consumer welfare. Two prominent cases involving the exercise of buyer power, in which the harm is suffered upstream rather than downstream, prove this point: *T-Mobile*¹⁰⁴ and *British Airways*.¹⁰⁵ The *T-Mobile* case¹⁰⁶ essentially concerned exchange of information among buyers with a view to coordinating prices paid upstream: the Dutch telecom operators had collectively conspired to reduce the remuneration of dealers of postpaid subscriptions. In contrast to a cartel of sellers, the goal of the agreement was not to raise prices to final consumers, but rather to reduce costs. The harm would be experienced upstream – by the dealers whose remunerations would shrink.

In its reference for a preliminary ruling, the national court posed the question if it was important that the practice did not relate to the prices for end users.¹⁰⁷ On the

¹⁰² Intel had claimed that the fine was of a disproportionate nature and that even though a finding of actual anticompetitive effects might not be required for the finding of abuse, then it should matter for the level of the fine *Intel* (n 99), [1621]. The Court disagreed and stated: “Second, in so far as the applicant submits that the Commission was wrong not to take into account the absence of actual anti-competitive effects of the infringement and of a causal link between those effects and harm to consumers or competitors as an attenuating factor for the assessment of the gravity, its arguments must also be rejected. The Court finds that, in order to set the proportion of the value of sales determined by reference to the gravity of the infringement at 5%, the Commission was not required to take into consideration the alleged absence of any actual impact of the infringement on the market. In the present case, the other matters on which the Commission relied in the contested decision for the purposes of determining the gravity of the infringement justify the setting of the proportion of the value of sales to be taken into consideration at 5%.” *Intel* (n 99), [1630].

¹⁰³ *Ibid.*, [1621].

¹⁰⁴ *T-Mobile* (n 5).

¹⁰⁵ *British Airways* (n 92).

¹⁰⁶ *T-Mobile* (n 5).

¹⁰⁷ In the judgment we read: “The referring court states, first, that the concerted practice at issue in the main proceedings relates neither to the consumer prices to be applied by the undertakings in question nor to the subscription tariffs to be invoiced by those operators to the end users. What it actually relates to is the

understanding that the harm was not to be felt by final consumers, the referring court and the parties to the proceedings had submitted that the practice did not constitute a restriction by object.¹⁰⁸ In her Opinion, AG Kokott rejected the relevance of showing harm to consumer welfare¹⁰⁹ and the Court agreed with her.¹¹⁰ The Court took that decision despite evidence by the Dutch government that the remuneration to dealers did in fact matter for the final consumer prices.¹¹¹ Essentially, the judgment did not discuss whether the reduction of the telecom operators' costs as a result of the cartel was likely to benefit consumers in the form of lower prices, but held that the agreement restricted competition as such.

Similarly, in the earlier *British Airways* judgment the Court of Justice refused the need to prove harm to final consumers in the context of a decision on Art 102 TFEU.¹¹² Instead, the Court acknowledged that there had been harm to the providers of travel agent services. The case concerned the reward schemes offered by British Airways to travel agents. In addition to the exclusionary effect of the schemes vis-à-vis British Airways' competitors, the practice was found to distort competition on the market for travel agent services. Because the reward schemes allowed travel agents to earn different commissions for equivalent services,¹¹³ the schemes were found to place some travel agents at a competitive disadvantage, thus falling within the scope of the prohibition of discrimination in Article 102(c) TFEU. The analysis of the Court in *British Airways* ended with a finding that since the ability of travel agents to compete with each other depend on their financial means, the competition on that market was liable to be distorted.¹¹⁴ No further proof of actual downstream effects in terms of a decrease in choice of travel agents or in terms of price competition among them was required.¹¹⁵ Additionally, in *British Airways*, the Court specifically confirmed that Article 102 TFEU applies not only to downstream markets, but also to upstream markets and that the

remuneration which those operators intend to pay for the services supplied to them by dealers. The point that is therefore emphasised by the referring court is that the direct object of the concerted practice cannot be said to be the determination of prices for postpaid subscriptions on the retail market.” (italics added) *T-Mobile* (n 5), [19].

¹⁰⁸ See Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, Opinion of AG Kokott, [55-56].

¹⁰⁹ Advocate General Kokott underplayed the relevance of consumer welfare “Thus, a concerted practice has an anti-competitive object not only where it is capable of having a *direct* impact on consumers and the prices payable by them, or – as T-Mobile puts it – on ‘consumer welfare’. *Ibid.*, [59].

¹¹⁰ *T-Mobile* (n 5), [36].

¹¹¹ The Court held: “Third, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.” *Ibid.*, [37].

¹¹² *British Airways* (n 92), [107].

¹¹³ The reward was based on the increase in an agents' sales and not on the absolute number of tickets sold, thus making it possible that two agents selling the same number of British Airways tickets would receive different commissions. See paragraphs [130] and [135] in *British Airways* (n 92).

¹¹⁴ *Ibid.*, [146-148]

¹¹⁵ *Ibid.*, [149].

provision applies to conduct by powerful sellers as much as to conduct by powerful buyers.¹¹⁶

These rulings of the Court of Justice show that consumer harm, whether it is to the final or the intermediary purchaser, is not the only type of harm that matters in competition law cases. Harm to producers or sellers is also considered important for the purposes of EU competition law, regardless of the final effect on consumers.

3.3. Consumer surplus v competition on the market

The next question to address is whether the narrow price-based version of welfare – namely consumer surplus – could be considered the standard in the EU. With respect to the Court’s practice, we may safely say that the Court has not paid any specific attention to price effects. In fact, the Court has resisted the notion that concrete harm needs to be proven at all, instead insisting on the need to protect competition on the market or the “choice of suppliers”. This trend in the jurisprudence of the Court has put in question the relevance of the more economic approach proposed by the Commission and the statements about the importance of consumer welfare.

In cases concerning Article 101 TFEU, the Court has continued to make use of the “restriction by object” category in and has rejected the need to show concrete harm in the context of agreements among competitors,¹¹⁷ much to the dismay of those expecting more effects-based analysis. Not only that, but the Court has even expanded the category of restrictions by object to encompass selective distribution schemes aiming to prevent online sales as in the *Pierre Fabre* case.¹¹⁸ Similarly, in cases falling under Article 102 TFEU, the Court has rejected the need to prove any consumer harm¹¹⁹ and in general to prove *actual* harm to competitors and business partners in detail.¹²⁰

¹¹⁶ *Ibid.*, [101], [143].

¹¹⁷ See Case C-105/04 *P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission of the European Communities* [2006] ECR I-08725, [125]; C-125/07 *P Erste Group Bank AG (C-125/07 P), Raiffeisen Zentralbank Österreich AG (C-133/07 P), Bank Austria Creditanstalt AG (C-135/07 P) and Österreichische Volksbanken AG (C-137/07 P) v Commission of the European Communities* [2009] ECR I-08681, [118]; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*, [2008] ECR I-08637, [16]; Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, summary judgment [1].

¹¹⁸ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi* [2011] ECR I-09419.

¹¹⁹ *British Airways* (n 92), [106-107]

¹²⁰ See *Ibid.*, [100], [149] and Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of the European Communities* [2009] ECR II-03155, [193 and 194]. In *British Airways*, the Court declines to address British Airways’ arguments that there was no effect on competitors because the proportion of sales going to British Airways decreased and the market share of British Airways’ competitors increased. The Court found it sufficient that the travel agent reward scheme had a loyalty-increasing effect which made them liable to affect the competitive position of competitors. See *British Airways* (n 92), [100]. It is also worth noting that in the 2006 judgment in *Erste Group Bank and Others v Commission*, the ECJ went against the recommendation of Advocate General Bot who advised that the Commission should be required to show the effect of the agreement and not just rely on the fact that the cartel was partially implemented in order to assume market impact. C-125/07 *P Erste Group Bank AG (C-125/07 P), Raiffeisen Zentralbank Österreich AG (C-133/07 P), Bank Austria Creditanstalt AG (C-135/07 P) and Österreichische Volksbanken AG (C-137/07 P) v*

When it comes to the extent that consumer price effects matter vis-à-vis the other parameters of competition, perhaps most telling are the Court's judgments in the margin squeeze and predatory pricing cases of recent years. The paradox of predatory pricing as well as margin squeeze cases is that, at least in the short run, consumers suffer no harm and might in fact enjoy various benefits, including low prices. In fact, according to the US Supreme Court, attempts at predation produce low prices and as such are a "boon to consumers".¹²¹

The danger in both margin squeeze and predatory pricing cases is that consumers will suffer in the long run – after competitors have exited and the development of competition has been thwarted. With weakened competition it is expected that prices will raise or quality might decline. From an enforcement perspective, the difficulty lies in determining when such practices are likely to lead to harmful effects or when they are the "stuff" of competition, namely, ambitious plans to win over new customers.¹²² Deterring such conduct carries the risk that the welfare of present day consumers will be hurt on grounds of possible future welfare decreases, namely false positives in such cases are liable to bring imminent consumer harm in terms of higher prices.

For instance, in the *Wanadoo* case consumers very likely enjoyed the advantageous prices offered by the dominant company. Their welfare, as measured in terms of *short-run* consumer surplus, increased. However, the Court did not engage in an explicit balancing exercise to determine whether the increase in surplus was likely to be offset by likely future losses of welfare. The Court's analysis in *Wanadoo* focused exclusively on the danger of competitors exiting the market, thus assuming that future welfare would be harmed. Possibility of recoupment is essentially the way to measure future consumer harm in terms of higher prices. The Court did not require proof of likelihood of future welfare losses because it rejected the necessity to prove the likelihood of

Commission of the European Communities [2009] ECR I-08681, Opinion of AG Bot, [301-316]. The Court disagreed with the Advocate General and held that the very implementation, even if incomplete, sufficed to exclude the possibility of no market impact. Namely, the fact that the agreement was put into effect, albeit partially, sufficed for the finding of an anticompetitive harm. See C-125/07 P *Erste Group Bank AG* (C-125/07 P), *Raiffeisen Zentralbank Österreich AG* (C-133/07 P), *Bank Austria Creditanstalt AG* (C-135/07 P) and *Österreichische Volksbanken AG* (C-137/07 P) v *Commission of the European Communities* [2009] ECR I-08681, [118]. The ECJ found that the CFI had not erred in law when holding that failure by some members of the cartel to comply with the agreements or to sustain the collusive rates as well as the fact that they kept competing on other product markets was not sufficient to find that the agreements had not impact on the market. The Court stated "*The Commission observes that the economic report produced by the banks related to only two banking products and not to the potential effects of the agreement on the market. In any event, the implementation, even if partial, of an agreement whose object is anti-competitive is sufficient to preclude any finding that that agreement had no impact on the market.*" (italics added).

¹²¹ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993) at [224]. The U.S. Supreme Court stated: "Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers."

¹²² Consider the claims by WIN in the *Wanadoo* case that its pricing strategy was not part of a plan to eliminate a competitor, but rather reflected its 'rather ambitious commercial objectives'. See Case C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECR I-02369 (*Wanadoo*), [89].

recoupment and in fact stated that even if there was no possibility of recoupment, this would still not matter for the finding of abuse.¹²³

Margin squeeze cases presents us with the same difficulty – namely, that in the short run there might be a benefit, or in any case, no harm in terms of prices to final consumers. The harm is expected to materialize in the future, once competitors have exited the market. In *Deutsche Telekom*, the Court did not consider the need for consumer harm. In fact, the Court avoided Deutsche Telekom’s arguments that avoiding a margin squeeze would have forced it to charge excessive prices to consumers.¹²⁴ Essentially this meant that the Court was prompted to consider the tradeoffs between possible present-day harmful effects on consumer prices and the likelihood of loss of competition. The Court missed the opportunity to elaborate on this distinction. In general, it required no proof of effect beyond the existence of the squeeze as determined by reference to the company’s own costs.¹²⁵ In *Telia Sonera*, the Court found that the mere potential for an exclusionary effect sufficed for the finding of abuse.¹²⁶

The judgment in *Post Danmark* promised a willingness on the part of the Court to pay more attention to the likely impact of dominant company conduct as measured in terms of consumer welfare. In its ruling, the Court of Justice held that a finding of abuse would require considering whether the pricing practice “produces *an actual or likely* exclusionary effect”.¹²⁷ This is quite different from finding an abuse by presumption of harm and thus showed a breaking of the ice in the Court’s approach to effects-based analysis and consumer welfare. However, what the judgment actually means for the tradeoff between future welfare and present-day welfare or the tradeoff of welfare in terms of choice and innovation and welfare in terms of surplus – we still do not know. This is the biggest problem with *Post Danmark* – namely, that by introducing references to consumer welfare and suggesting a change of approach to a more rigorous analysis of effects, it raises more questions than it answers. Yet again, we are left wondering what “consumer welfare” means to the Court of Justice and how the different parameters (spatial, temporal) of “welfare” are to be counted.

The debate about the goals and the methodology of EU competition law has continued with much vigor beyond *Post Danmark*. The *Intel* judgment of the General Court in 2014 prompted numerous speculations about the fate of the more economic approach. The ruling in this case, concerning an infringement punished with the highest antitrust fine ever given in the EU, was considered a blow to the “more economic approach”. The recently published opinion of AG Kokott in *Post Danmark II* continues this

¹²³ *Ibid.*, [112-113].

¹²⁴ Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] I-09555, [165-166].

¹²⁵ *Ibid.*, [202] and Summary Judgment.

¹²⁶ *Ibid.*, [64] The Court elaborated: “It follows that, in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking.”

¹²⁷ *Post Danmark* (n 94).

trend.¹²⁸ If this trend continues, we might wonder if it is not futile to define the meaning of consumer welfare at all.

Yet such a conclusion does not obviate the need for clarity. References to consumer welfare and standards of assessment premised on an understanding of consumer welfare as the ultimate goal continue to proliferate in the soft law instruments giving flesh to antitrust enforcement and providing indications for self-assessment. Thus, even if consumer welfare is indeed demoted to a second-rank goal of EU competition law, it still matters to define what it means. On the other hand, if the Court's decision to support a consumer welfare standard is firm, then the Court needs to explain how a consumer welfare standard is to be understood. Without such guidance, academic debate will surely thrive, but legal certainty and consistency of enforcement will suffer.

CONCLUDING REMARKS

The goal of this article was to find out more about the substance of the EU consumer welfare standard by focusing on the meaning of welfare and the meaning of a consumer. The method was one of comparing the definitions of the Commission and the Courts with the economic notion of end-user surplus. The analysis shows that it is not possible, on the basis of the definitions in EU competition law soft law instruments and the applications of the European Courts, to conclude the EU notion of consumer welfare coincides with an end-user surplus standard.

This is, of course, only a partial answer to the larger question: what is EU competition law about? Uncertainty about the meaning of a consumer welfare standard continues to block our thinking on the fundamental issues in antitrust. Whose welfare counts most and what kind of tradeoffs can we make as between consumers, producers, and within consumer groups? What kind of welfare are we most interested in promoting? As the first section to this paper shows, the answers to these questions cannot be deduced from economic theory. The change of language in *Post Danmark* is only the beginning of the answer, not the ending of the conversation.

This paper has attempted to show that the meaning of consumer welfare is not self-explanatory and that the legal and economic literature can offer contradictory definitions. As the references for preliminary ruling in *Syfait*,¹²⁹ *Sot Lelos Kai*¹³⁰ and *T-Mobile* show, we cannot assume that national courts know what the Commission means by "consumer welfare". In this sense, the introduction of consumer welfare as a standard of assessment in EU competition law has compromised its objective of bringing uniformity of assessment across the EU. To preserve this important and fragile goal, the Commission and Courts need to face the problem and answer the basic questions relevant for any (competition law) case: what is harm, who can claim harm and what is the standard of proof? Such and other questions occupy national courts and authorities every day. Under the system of self-assessment introduced by the

¹²⁸ Case C-23/14 *Post Danmark A/S (Post Danmark II)* [21 May 2015] Opinion of Advocate General Kokott.

¹²⁹ *Syfait* (n 3).

¹³⁰ *Sot Lelos Kai* (n 4).

modernization, these questions are also of vital interest to businessmen and their lawyers. Last, but certainly not least, these questions are also of interest to the larger public, in the name of whose welfare the trade-offs are being made.